

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

In the Matter of
Virgin Mobile USA, L.P.

ICC Docket No. 14-0475

Application for Limited Designation as an
Eligible Telecommunications Carrier.

**VIRGIN MOBILE USA, L.P.'S
BRIEF ON EXCEPTIONS TO THE ALJ'S PROPOSED ORDER**

Virgin Mobile USA, L.P. ("Virgin Mobile"), pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code Part 200.830, states as follows for its brief on exceptions to the Administrative Law Judge's ("ALJ") Proposed Order issued March 23, 2015 ("Proposed Order").

I. SUMMARY

The Proposed Order recommends that the Commission approve Virgin Mobile's July 23, 2014 application to operate as a wireless eligible telecommunications carrier in the rural and non-rural areas where Sprint Corporation provides wireless coverage in Illinois, subject to certain conditions. Virgin Mobile agrees with that conclusion, but disagrees that the Commission can or should order it to seek guidance from the Illinois Department of Revenue after designation as a condition. Further, Virgin Mobile proposes language to clarify its ETC designated service area.

For its exceptions, Virgin Mobile proposes that the Proposed Order: (A) omit Condition No. 4, which would require Virgin Mobile to seek guidance from the Illinois Department of Revenue on the Prepaid Wireless 9-1-1 surcharge Act (50 ILCS 753) ("PW9SA") after the final

order is issued in this proceeding; (B) contain clarifying language relating to the parties' agreement on Virgin Mobile's ETC service area; and (C) be modified for proposed typographical corrections. Virgin Mobile attaches a legislative view of its proposed changes as Exhibit A.

II. EXCEPTIONS

Exception A: The Proposed Order Should Omit Incorporation of Proposed Condition No. 4

The Commission should decline to adopt the Proposed Order's incorporation of Staff's Condition No. 4 for at least three reasons. Condition No. 4 states:

Applicant should, within 30 days of designation, request guidance / clarification from the Illinois Department of Revenue regarding whether it is required to remit surcharges pursuant to PW9SA with respect to Lifeline customers subscribing to Applicant's primary Lifeline service package. Applicant should report any guidance / clarification received in response to this request, within this Docket, within five days of receipt of such guidance/clarification. Application should comply with any such guidance.

(Proposed Order, pg. 17).

First, under existing Commission practice and the FCC's *ETC Designation Order*, a stated commitment to remit 911 surcharges is sufficient to satisfy an ETC applicants' burden of proof to demonstrate that it meets the minimum FCC and Commission requirements to be designated as an ETC in Illinois.¹ Virgin Mobile repeatedly has stated its commitment to comply with its E911 duties and remit all applicable 911 surcharges.² Requiring Virgin Mobile to affirmatively petition a separate Illinois agency after the conclusion of these proceedings exceeds the FCC requirements, departs from the Commission's past practices, and exceeds the Commission's authority.

¹ *In the Matter of Federal-State Joint Board on Universal Service*, FCC Dkt. No. 96-45, Report and Order, 20 F.C.C.R. 6371 (rel. Mar. 17, 2005) ("*ETC Designation Order*").

² *See, e.g.*, Virgin Mobile Exhibit 1.0, 13:266-14:272; Virgin Mobile 2.0, 5:3-16.

Staff has the burden of demonstrating deviations from existing Commission practice of not imposing conditions on Lifeline providers to seek guidance from another state agency on whether the 911 fee applies to no charge Lifeline service.³ Indeed, the PW9SA has been in effect since January 1, 2012, and other Lifeline providers in Illinois are not required as part of their certification orders or subsequent annual re-certifications to obtain guidance from the Illinois Department of Revenue on the applicability of 911 fees to the Lifeline federal subsidies.

Here, the record is devoid of information calling into question Virgin Mobile's commitment to pay all applicable 911 surcharges and devoid of a justifiable rationale for forcing Virgin Mobile to initiate a proceeding with the Illinois Department of Revenue in order to demonstrate its intention to comply with ETC rules after designation. Further, the Proposed Order concludes that "[t]his same issue could recur in subsequent ETC Dockets and an opinion or ruling from IDOR in this matter could well provide the Commission with necessary guidance in such future proceedings." (Proposed Order, 22). However, there is no justification to impose such a burdensome requirement on Virgin Mobile when none of its competitors in the Lifeline market have been or will be subjected to the same condition. The Commission cannot discriminatorily impose such costs and expenses on Virgin Mobile solely for the benefit of other current and future Lifeline providers in Illinois. Therefore, there is no valid justification for the Commission to break with its current practices; it should decline to impose Condition No. 4 on Virgin Mobile.

³ See, e.g., 2 Am. Jur. 2d Administrative Law § 354 ("Under both federal and state administrative procedure acts, unless otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *Assure Competitive Transp., Inc. v. U.S.*, 629 F.2d 467, 477 (7th Cir. 1980) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *Illinois Commerce Commission on its Own Motion v. Commonwealth Edison Co.*, ICC Dkt. 92-0303, Order (rel. Spt. 7, 1994) (Commissioner Williams, dissenting) ("those who seek to change long-standing Commission regulation also must carry the burden of justifying the requested change....").

Second, the Commission does not have authority to compel Virgin Mobile to seek a post-designation advisory ruling from a separate Illinois agency as a condition of its ETC designation. The Proposed Order asserts that the Commission has the authority to impose any number of conditions on Lifeline applicants as it has done any previous cases. (Proposed Order, at 22). But the Commission derives its power and authority from the statute creating it, and it may not, by its own acts, extend its own jurisdictional authority. *Ace Ambulance & Oxygen Service Co. v. Ill. Commerce Comm’n.*, 75 Ill. App. 3d 17, 19 (3d Dist. 1979); *Ramsey Emergency Services, Inc. v. Illinois Commerce Commission*, 367 Ill. App. 3d 351, 357 (1st Dist. 2006) (finding that a reviewing court will set aside a Commission decision where the Commission acts outside the scope of its authority).

Here, there is no statute or regulation that permits the Commission to order an ETC applicant to initiate a separate legal proceeding with the Illinois Department of Revenue to resolve Staff’s concerns relating to the applicability of the PW9SA to Lifeline federal subsidies. The Proposed Order concludes that Virgin Mobile has the technical and financial capability to provide Lifeline service in Illinois and makes no mention that Condition 4 is required to protect the federal universal service program. (Proposed Order, at 20). Condition 4’s inclusion of the requirement to petition a separate state agency goes well beyond any previous condition imposed by this Commission – or by the FCC or the commission of any other state – on Lifeline providers in the guise of preventing waste, fraud and abuse related to the federal universal service fund. Indeed, Staff’s testimony admits that the Commission has no jurisdiction over the interpretation or administration of the PW9SA. When asked in rebuttal testimony, Dr. Zolnierrek acknowledged “the DOR administers the collection of 9-1-1 surcharges and is afforded the ability to implement

and enforce the PW9SA”⁴ and that, notwithstanding his view, “it is the DOR’s interpretation of the PW9SA that is relevant” to addressing whether or not federal subsidies are subject to remittance under the PW9SA.⁵ In addition, the premise of Condition No. 4 fundamentally conflicts with federal requirements. Federal regulations require all ETC providers to “pass through the full amount of support to the qualifying low-income consumer.”⁶ By contrast, Condition No. 4 assumes that a portion of the federal Lifeline subsidy must be diverted from the Lifeline consumer for state 911 remittances. That is incorrect. An ETC provider is not legally permitted to divert any portion of the federal Lifeline subsidy from the Lifeline consumer to the state. Therefore, the Commission has no authority to condition Virgin Mobile’s ETC designation on Condition No. 4.

Third, even if the Commission had authority to interpret or enforce the PW9SA, the plain language of the PW9SA exempts the imposition of the E911 fee upon providers of no charge or free Lifeline service. For example, the statute imposes “on consumers a prepaid wireless 9-1-1 surcharge of 1.5% per retail transaction”⁷ and Chicago “may impose a prepaid wireless 9-1-1 surcharge not to exceed 9% per retail transaction.”⁸ However, customers that sign up for and receive Lifeline services under the base Lifeline plan from Virgin Mobile pay nothing for their handset or services at the point of purchase and on an on-going monthly basis. Therefore, these customers are not engaging in a “retail transaction” subject to the E911 fee under the PW9SA.

⁴ Staff Exhibit 2.0, 7:146-148.

⁵ 50 Ill. Comp. Stat. § 753/15(a).

⁶ 47 C.F.R. § 54.203(a)(1).

⁷ *Id.*

⁸ 50 Ill. Comp. Stat. § 753/15(a-5).

Here, the question is not whether Virgin Mobile would be required to remit surcharges on add-on minute packages to the base Lifeline offering,⁹ as the Proposed Order suggests on page 23. Virgin Mobile commits to doing so because a “retail transaction” under the statute occurs in that instance and the fee can be added to the amount charged for the add-on minutes purchased. Instead, the question posed in Condition No. 4 relates solely to the base “free” Lifeline offering to Illinois consumers where there is no “retail transaction.”

In the instance of a no-charge base Lifeline offering, there is no “Consumer” to impose the fee upon as there is no purchase and no retail transaction. The fee is “imposed on consumers” under 50 ILL. COMP. STAT. § 753/15(a) and (a-5) and only applies if there is a consumer as that term is defined in PW9SA. In addition, the Proposed Order on page 21 incorrectly concludes that there is a “purchase” on Virgin Mobile’s base Lifeline plan. Purchase is defined as “to buy (property, goods, etc.); to get (something) by paying money for it.”¹⁰ Since there is no money paid for the base Lifeline package, there is no purchase and no retail transaction takes place as defined in statute. The federal Lifeline subsidy cannot be considered part of a retail transaction because the Lifeline customer never receives the \$9.25 subsidy and never exchanges the \$9.25 subsidy for Lifeline services. Instead, USAC makes clear that the Lifeline subsidy is received by the ETC provider, not the Lifeline customer. *See, e.g.,* <http://www.usac.org/li/telecom-carriers/step01/default.aspx> (“Lifeline Program support is provided to eligible telecommunications carrier (ETCs) from the federal universal service fund... To obtain program support, an ETC must submit its monthly support claims through the FCC Form 497, which includes a certification that the ETC will pass through the full amount of

⁹ For clarity, Virgin Mobile would be required – and commits – to remit surcharges on amounts paid by the consumer over the *de minimis* amount.

¹⁰ <http://www.merriam-webster.com/dictionary/purchase>

support to the eligible consumer...”). Consequently, the \$9.25 Lifeline subsidy is never exchanged between the Lifeline customer and an ETC provider, and cannot be considered part of a purchase or retail transaction. The customer is not part of the reimbursement process between USAC and the ETC and cannot direct how or where to apply the \$9.25 reimbursement. In addition, Section 15(f) of the PW9SA contemplates the situation where a provider does not remit E911 fees on *de minimis* amounts of service, and gives the seller the option to not apply the E911 fees to such a transaction.

The Proposed Order’s rationale, citing to Staff’s testimony that a carrier who does not pay its fair share of E911 fees “increases its profitability at the expense of the system” (Proposed Order at 23), is undermined by the plain language of the PW9SA. The statute imposes the prepaid wireless 911 surcharge upon “consumers” of prepaid wireless service and not upon the provider: “(a) There is hereby imposed on *consumers* a prepaid wireless 911 surcharge...”¹¹ and “[t]he prepaid wireless 911 surcharge is imposed on the *consumer and not on any provider*.”¹² Since the fee under the statute is imposed upon *consumers*, Virgin Mobile, the *provider*, cannot be accused of paying less than its fair share.

Finally, the Proposed Order claims Virgin Mobile’s concerns of the fee applying to it alone and not to other Lifeline providers are premature and unfounded as Condition 4 just requires it to seek an opinion from the Illinois Department of Revenue and no opinion has been rendered. However, the Proposed Order posits that a ruling from the Illinois Department of Revenue would be useful guidance for the Commission in future ETC proceedings. (Proposed Order, at 23). Condition 4, however, requires Virgin Mobile “to comply with any such

¹¹ 50 Ill. Comp. Stat. § 753/15(a) (*italics added*).

¹² 50 Ill. Comp. Stat. § 753/15(c) (*italics added*).

guidance/clarification.” It is undisputed that Virgin Mobile would be the only Lifeline carrier in Illinois required to seek and comply with an opinion from the Illinois Department of Revenue. Compelling Virgin Mobile to pay for guidance for future ETC applicants discriminates against Virgin Mobile as there are multiple providers in the Illinois market *now* that are not required to comply with an Illinois Department ruling. The disadvantage is real. If Virgin Mobile is required to pay the 9% fee in Chicago on no charge customers, it would be liable to pay \$.8325 a month per customer in Chicago based on the federal \$9.25 reimbursement amount. The fee would be \$.13875 a month for customers outside of Chicago. Both amounts would present Virgin Mobile a significant disadvantage in the Illinois Lifeline market vis-a-vis the multiple other providers in Illinois that currently do not remit the fees on their no charge Lifeline customers.

Under any reasonable interpretation of the PW9SA, no remittance is required.

Therefore, Condition No. 4 is not required and should not be imposed on Virgin Mobile because the plain language of the PW9SA does not require remittances on Virgin Mobile’s base Lifeline offering.

As a result, Virgin Mobile proposes the following modifications to the Proposed Order:

- In Section IV, pg. 21: The fifth paragraph after the “Condition #4” heading should be replaced to state: “The Commission agrees with the Applicant. Since no “retail transaction” occurs with a no charge Lifeline customer and the fee cannot be imposed upon a “consumer” as required by the PW9SA, we see no need for Applicant to seek the opinion of the IDOR regarding the applicability of the fee. Moreover, the condition proposed by Staff could have the effect of treating the Applicant differently than other Lifeline providers in Illinois. It would be

unfair for the Applicant to remit fees if its competitors in the Lifeline market in Illinois do not do so. Since there is no way to bill consumers receiving free service on the baseline offering, then the Applicant would have to remit E911 fees from the federal reimbursement amount. In other words, the Applicant would have to pay the fees itself rather than collecting the fees from its subscribers.”

- In Section IV, pg. 22: The ninth paragraph after the “Condition #4” heading should be replaced to state: “The Commission agrees with Applicant. The Commission does not have jurisdiction to compel Applicant to seek a ruling from IDOR. In numerous prior ETC Dockets for both Lifeline and non-Lifeline service, the Commission has imposed a myriad of commitments and conditions designed to facilitate customer service and to protect the Lifeline program against waste, fraud and abuse.¹³ The imposition of a condition in this Docket requiring Applicant to seek guidance/clarification from IDOR regarding collection of the surcharge, is beyond the scope of any of the conditions previously imposed in prior ETC Dockets.”
- In Section IV, pg. 22: The last sentence in the eleventh paragraph after the “Condition #4” heading should be deleted.
- In Section IV, pg. 22: The twelfth paragraph after the “Condition #4” heading should be deleted.
- In Section IV, pg. 23: The fourteenth paragraph after the “Condition #4” heading should be deleted with the exception of the first sentence, which should be added

¹³ See e.g., Commission Dockets 09-0269, 09-0605, 10-0452, 10-0453, 10-0512, 10-0524, 11-0073, 12-0680 (commitments and conditions contained in an attached Agreed Joint Stipulation).

to the thirteenth and modified to state: “The Commission takes no position with respect to this argument.”

- In Section IV, pg. 23: The seventeenth paragraph after the “Condition #4” heading should be deleted and replaced by the following statement: “Applicant’s concerns are noted but are moot because the Commission does not have jurisdiction to compel Applicant to seek a ruling from IDOR.”
- In Section IV, pg. 23: The first sentence in the last paragraph in the after the “Condition #4” heading should be modified to state: “Commission finds that Applicant should comply with the twelve conditions proposed by Staff (Nos. 1-3, 5-13), as set forth in Staff Ex. 1.0 at 36-38 and listed in this Order at 16-17.”
- In Section V, pg. 24: The fifth finding of fact should be modified to state: “as a requirement of ETC designation, Applicant should comply with the twelve (12) conditions proposed by Staff in Ex. 1.0 at 36-38 (Nos. 1-3, 5-13), and listed in this Order at 16-17;”
- In Section V, pg. 24: The second ordering clause should be modified to state: “IT IS FURTHER ORDERED that Applicant shall comply with the twelve (12) conditions proposed by Staff in Ex. 1.0 at 36-38, and listed in this Order at 16-17;”

Exception B: The Proposed Order Should Contain Clarifying Language Relating To Virgin Mobile’s ETC Service Area Designation

The Proposed Order should also be modified to clarify the Commission’s background discussion relating to Virgin Mobile’s ETC service area designation. The Proposed Order designates Virgin Mobile’s ETC service area as “the rural and non-rural areas where Sprint

Corporation provides wireless coverage in Illinois.” (Findings Clause (1)). Virgin Mobile agrees with that statement of its proposed ETC service area in Illinois.

Clarification is required because of the Proposed Order’s background discussion of ETC service areas gives the impression that Virgin Mobile may not provide Lifeline services in a geographic area smaller than an exchange area. Virgin Mobile’s designated service area in Illinois includes partial exchanges, as indicated in Virgin Mobile Exhibit 2.1, and is correctly described as consisting of the contours of Sprint Corporation’s coverage in Illinois regardless of whether Sprint Corporation covers an entire exchange.

Staff agrees that Virgin Mobile’s ETC designation includes partial exchanges. In its Initial Brief, Staff states that “Virgin Mobile proposes a custom service area definition that does not follow either exchanges or wire centers, but rather is defined by the contours of the Sprint network coverage area.” (Staff IB, pg. 17). Staff recommends that the Commission adopts this custom service area because “Virgin Mobile has provided an example of how a customer can determine, based upon his/her address and the information provided in this proceeding by Virgin Mobile, whether or not the customer’s home is with the Virgin Mobile ETC Service area.” (*Id.*). Therefore, references in the Proposed Order to an exchange being the minimum permissible geographic designation for ETC service areas may cause confusion with respect to the scope of Virgin Mobile’s ETC service area designation.

As a result, Virgin Mobile proposes the following modifications to the Proposed Order:

- Section I.B., page 8: The second paragraph should be followed by: “Mr. Burt further testified that Virgin Mobile seeks designation in the geographic areas in every rural and non-rural incumbent local exchange carrier exchange area where Sprint (Virgin Mobile’s parent company) provides wireless coverage in Illinois).

Attached to Mr. Burt's Rebuttal Testimony, as Exhibit 2.1, is a list of complete and partial exchanges for which Virgin Mobile proposes to serve and, attached as Exhibit 2.2, are maps of the fully and partially served exchanges that comprise Virgin Mobile's proposed ETC service area."

- Section III.B., page 19: The following paragraph should be included in the second paragraph: "Following the exchange of testimony, Staff indicated in its Initial Brief that "Virgin Mobile proposes a custom service area definition that does not follow either exchanges or wire centers, but rather is defined by the contours of the Sprint network coverage area." (Staff IB, 17). However, Staff concludes that Virgin Mobile has provided an example of how a customer can determine, based upon his/her address and the information provided in this proceeding by Virgin Mobile, whether or not the customer's home is within the Virgin Mobile ETC service area. "Therefore, based upon the evidence presented by Virgin Mobile, Staff recommends the Commission find that Virgin Mobile has adequately and appropriately defined its proposed ETC service area." (*Id.*)"
- Section IV, page 19: In the second paragraph, "normally" and "and Virgin Mobile Exhibit 2.1" should be added to the first sentence.
- In Section IV, Pg. 19: In the second paragraph, the following should be added to the end of the paragraph: "Here, however, the Applicant has demonstrated how a customer can determine, based upon his/her address and the information provided in this proceeding by Virgin Mobile, whether or not the customer's home is within the Virgin Mobile ETC service area. Therefore, the Commission adopts Staff's recommendation and designates the Applicant's ETC service area as the

contours of the Sprint network coverage area as identified in Virgin Mobile 2.1 and 2.2.”

Exception C: Proposed Typographical Corrections

Lastly, Virgin Mobile proposes the following typographical corrections and additional revisions to ensure clarity in the Proposed Order:

- In the introductory section, page 1: The extra space between “State” and “as” should be removed in the sentence that states: “... 1.4 Lifeline Subscriber Count by State as of July 2014 (conf), ...”
- Section I.A., page 5: The “S” in “Staffed” should not be capitalized in the sentence that states: “Local switching offices staffed by trained technicians coordinate with larger operations centers to ensure that Sprint’s networks are properly maintained and network performance is at expected levels.”
- Section I.B., page 8: The first sentence of Section B. should be modified to state: “Mr. Burt testified that Applicant would remit all 911 and E911 fees in a timely manner, but that remittance on the base Lifeline offering is not required.”
- Section III.A.II., page 9: The first sentence of the third paragraph of Section A.II. should state “is” instead of “in.”
- Section III.A.II., page 10: The second sentence of the tenth paragraph of Section A.II. should include an “a” before the word “different.”
- Section III.A.II., page 11: The first sentence of the sixteenth paragraph of Section A.II. should include a space after “demonstrate.”
- Section III.A.II., page 13: The third sentence of the twenty-fifth paragraph of Section A.II. should include “in” before “compliance.”

- Section III.A.II., page 13: The first sentence of the twenty-sixth paragraph of Section A.II. should include “handsets” after “E911-capable.”
- Section III.A.II., page 14: The second sentence of the twenty-seventh paragraph of Section A.II. should include a quotation mark after “WETSA.”
- Section III.A.III., page 15: The beginning of the first paragraph of Section A.III. should state “Dr. Zolnierrek further testified that” to avoid confusion.
- Section III.A.III., page 16: The beginning of the sixth paragraph of Section A.III. should state “Dr. Zolnierrek further testified that” to avoid confusion.
- Section III.A.III., page 17: The beginning of the eighth paragraph of Section A.III. should state “Dr. Zolnierrek further testified that” to avoid confusion.
- Section III.A.III., page 17: No. 7 in the itemized list should end with the phrase “in Illinois” to avoid confusion.
- Section III.A.III., page 17: No. 7 in the itemized list should omit the extra comma.

III. CONCLUSION

Virgin Mobile thanks the ALJ for his extensive examination of the issues in this matter. Virgin Mobile recommends the modifications and clarifications described above while preserving the conclusions from the Proposed Order granting Virgin Mobile ETC designation in Illinois. Virgin Mobile respectfully requests that the ALJ accept its proposed exceptions and adopt its proposed revisions to the Proposed Order as reflected in Exhibit A.

Dated: April 6, 2015

Respectfully Submitted,



Henry T. Kelly
Michael R. Dover
Kelley Drye & Warren LLP
333 West Wacker Drive, 26th Floor
Chicago, IL 60606
(312) 857-2350
HKelly@KelleyDrye.com
MDover@KelleyDrye.com

Attorneys for Virgin Mobile USA, L.P.